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August 14, 2020

CHANCELLORS  
LAWRENCE BERKELEY NATIONAL LABORATORY DIRECTOR  
VICE PRESIDENT—AGRICULTURE AND NATURAL RESOURCES

RE: Revised Sexual Violence and Sexual Harassment Policy and Implementing Procedures

Dear Colleagues:

Today, the new federal Title IX regulations go into effect. Issued by the U.S. Department of Education (“DOE”) on May 6 of this year, the regulations detail how schools across the country must respond to complaints of sexual harassment, including sexual violence. The University identified serious concerns with the regulations when the DOE first proposed them. Despite our advocacy for changes, the DOE retained many of the most problematic parts in the final rules. As the University’s federal funding is conditioned on compliance with the regulations, we will now fully implement them.

For the past 100 days, our offices and UC Legal have undertaken the task of revising our processes, resulting in the interim presidential policies issued today by Provost Brown, acting under powers granted by the Regents. Our mandate was to comply with the regulations without compromising the University’s values or the sexual harassment prevention, detection and response efforts so critical to its mission. Our work was aided by a diverse systemwide workgroup we formed in response to the regulations. That workgroup included representatives of the Academic Senate, students and staff, and professionals from the offices most directly involved in resolution processes, including Title IX, Student Conduct, CARE, Respondent Services, Hearing Coordinators, Academic Personnel and Human Resources. The workgroup provided valuable advice on how best to implement the regulations in a way that continues to treat parties with respect and kindness, and ensure just and reliable outcomes. The policies issued today reflect their careful work.

This letter highlights key requirements in the regulations, important things to understand about how the regulations do and do not affect the University, some of the significant changes to the policies issued today, and future steps. Resources to help the UC community understand the revised policies are available on the Systemwide Title IX Office’s website ([here](#)).

### Key Requirements and Understandings

*Required Grievance Process; Live Hearings and Appeals.* Most significantly, the Title IX regulations require that the University follow a specific grievance process (“DOE Grievance Process”) in response to complaints of conduct covered by the regulations (“DOE-Covered Conduct”). The regulations are prescriptive about what must be included. Even so, we already have many required components, such as detailed written notices at the beginning and end of the process, the right to an advisor, the opportunity to identify witnesses and

present evidence, and measures to ensure access to our programs and activities; these are important to a fair process. However, we have not previously provided other components because we believe they are unnecessary or do not reflect best practices. Most notably, this includes live hearings and appeals for cases with faculty and staff respondents. Because faculty and many staff already have the right to a hearing at the disciplinary stage under other policies, these additional requirements mean it will be more difficult and take longer to hold employees accountable for DOE-Covered Conduct than other types of misconduct. Also notable are certain procedures, like allowing parties to question each other through their advisors at the live hearing.

The University's Sexual Violence and Sexual Harassment ("SVSH") Policy is more expansive than the regulations in both conduct prohibited and its coverage. The University will apply the DOE Grievance Process only when required, in response to DOE-Covered Conduct. It will follow its existing resolution processes for all other reports under the SVSH Policy. Although administering two separate processes for similar conduct is more difficult, we believe this approach is the most protective of our community.

*Unchanged Scope of SVSH Policy.* The prospect of the regulations has been a source of anxiety for many students and others in the University community. It is important to understand that the University will continue to prohibit all forms of misconduct previously prohibited by the SVSH Policy, and to treat allegations of misconduct with uninterrupted seriousness and care. The scope of the SVSH Policy is unchanged, as is our commitment to preventing and responding to reports.

*Unchanged Responsible Employee Obligations.* The obligation of UC employees to report possible sexual harassment to the Title IX Officer is established by the SVSH Policy, and unchanged by the Title IX regulations. The SVSH Policy requires all employees who are not Confidential Resources to inform the Title IX officer of possible Prohibited Conduct (as defined in the policy) toward any student, and designated employees to inform the Title IX officer of possible Prohibited Conduct toward any other University affiliate. These obligations help enable the Title IX officers to respond appropriately to possible misconduct—and an employee's failure to comply with them may result in corrective or other action. We would appreciate your help in reinforcing the importance of this continuing obligation.

*DOE Grievance Process is Prospective.* In an August 5, 2020 announcement, the Department clarified that schools are required to apply the DOE Grievance Process only to alleged conduct that occurs on or after August 14, 2020. So, we will apply our existing resolution processes to all cases currently underway and allegations of conduct that occurred before August 14, whenever received, even if the conduct would otherwise qualify as DOE-Covered Conduct.

*Evidentiary Standard.* The regulations require we use the same evidentiary standard in all sexual harassment cases, regardless of the respondent's identity. As stated in the SVSH Policy, the University uses the preponderance of the evidence standard; this is not only a deliberate policy decision, but required by state law in student sexual violence cases. The clear and convincing standard, on the other hand, is used in faculty privilege and tenure hearings. This standard is codified in the Academic Senate Bylaws, which only the Academic Senate can change, and full resolution of this issue was not practical in the short time-frame available. As an interim solution, the UC Privilege & Tenure Committee issued an advisory to divisional hearing committees on August 4 that they should, after any privilege and tenure hearing following a DOE Grievance Process, evaluate evidence under both standards and, in the findings of fact, conclusions, recommendations, include analysis under both standards. As stated in the advisory, "this will facilitate the Chancellor's final decision making process, and will be in accordance with UC policy and applicable laws." It

will be important for the Academic Senate and administration to work carefully but quickly on a more direct and effective solution to this issue, preferably before any DOE-Covered Cases reach the privilege and tenure hearing stage.

### Significant Policy Changes

In the revised interim policies issued today, we call your attention to the following key provisions:

#### *Sexual Violence and Sexual Harassment Policy:*

- The regulations define sexual misconduct to include conduct on the basis of sex even if it is not sexual in nature. In response, the Prohibited Conduct definitions are revised where appropriate to prohibit conduct based on gender, gender identity, gender expression, sex, sex- or gender-stereotyping, and sexual orientation. Although some such allegations must now go through the DOE Grievance Process, we are otherwise pleased to expand the scope of the policy to address such conduct.
- As noted above, the University will apply the DOE Grievance Process only when required, in response to DOE-Covered Conduct. A new Appendix IV to the policy explains how the Title IX Officer will determine whether conduct is DOE-Covered Conduct and, if so, how to proceed.
- Relatedly, the regulations require the Title IX Officer to “dismiss” from the DOE Grievance Process any allegations they determine are not DOE-Covered Conduct. Dismissal does not necessarily mean the Title IX Officer will close the matter; rather, they will decide in each case whether and how to continue resolution of the “dismissed” allegations. Dismissal does trigger certain rights of the parties, including the right to appeal the decision to “dismiss.” This also is explained in Appendix IV.
- Conduct is DOE-Covered Conduct only if, among other things, it occurred in a University “program or activity,” defined expansively in the regulations to include all of the University’s operations. The SVSH Policy previously referred in several places to “programs, activities or services.” We removed the word “services” because it is superfluous—services are included in “programs and activities”—and it would be confusing to suggest otherwise now that the regulations emphasize the importance of the term “program or activity.” This does not affect the scope of the SVSH Policy, which is unchanged, and continues to cover on-campus conduct, conduct in a University program or activity (wherever located), and off-campus conduct that creates a hostile environment on campus or in a University program or activity.
- The University will continue to provide supportive measures, including interim measures, to people in a resolution process or affected by Prohibited Conduct. The terms and definitions for these measures are revised to align with the regulatory language, including stating that measures provided in connection with DOE-Covered Conduct cannot be punitive or disciplinary, or unreasonably burden a party.
- The regulations prohibit Alternative Resolution when the respondent is an employee and the complainant is a student. This is consistent with the University’s current approach, and not a meaningful change. However, this prohibition is now explicit in the policy, for all cases.

#### *Policies Applying to Campus Activities, Organizations, and Students (PACAOS) Appendix F: SVSH Student Investigation and Adjudication Framework for DOE-Covered Conduct (“Appendix F”):*

Last year, we revised the existing student framework, PACAOS Appendix E, to provide for live hearings in SVSH cases. This was in response to a California appellate court ruling. Appendix F, modeled on Appendix E, is a new policy that sets forth the University’s procedures for resolving DOE Formal Complaints of DOE-Covered

Conduct, as defined in the SVSH Policy, where the responding parties are students. Both include the following important components:

- the Title IX office conducting a thorough and impartial investigation, making factual findings, and reaching a preliminary determination of whether the respondent violated the SVSH Policy;
- the equal right of both parties to present, review, and respond to evidence during the investigation;
- the opportunity for the parties to accept the investigator’s preliminary determination and any proposed sanction, thereby foregoing a hearing;
- alternatively, the equal opportunity for the parties to not accept the investigator’s preliminary determination and have a hearing to determine whether the respondent violated the SVSH Policy;
- assignment of a hearing coordinator, separate from a hearing officer, to coordinate hearings;
- measures to ensure the well-being of parties during the hearing, such as:
  - visual separation, if desired;
  - presence of an advisor and support person; and
  - the opportunity to take breaks.

Some significant differences in Appendix F required by the regulations include:

- parties are specifically allowed to present evidence from expert witnesses, if relevant;
- limitations on the University’s ability to consider evidence that is privileged or contained in medical and behavioral health records;
- in the evidence review, parties can review all evidence “directly related” to the allegations; this is a standard broader than relevance (the standard in Appendix E);
- at the live hearing, the parties can ask questions of each other and witnesses through their advisor. If a party does not have an advisor at the hearing, the University will assign someone (a “Reader”) to read the party’s questions. Under Appendix E, by comparison, the hearing officer asks the parties’ proposed questions;
- the hearing officer may exclude questions posed by parties if they are not relevant, but only after the advisor or Reader has asked them in the hearing. Under Appendix E, the hearing officer reviews the questions to ensure they are relevant and not harassing before asking them;
- on any disputed and material issue, the hearing officer may not rely on any statement of a party or witness about which they refuse to answer questions at the hearing. Under Appendix E, this is only true when credibility of the party is central to determination of the issue; and
- the parties are allowed to appeal on certain grounds specified in the regulations, additional to the grounds in Appendix E.

We also built into Appendix F additional safeguards to ensure that live hearings proceed respectfully. These include:

- the stated expectation that parties and their advisors adhere to the University’s rules of conduct for the process (available [here](#)) with potential disqualification of advisors who do not comply;
- the hearing officer asking their own questions of parties and witnesses first during the hearing, to elicit as much relevant information as possible before the questioning by parties’ advisors or Readers;

- the parties preparing their own questions, including follow-up questions, to be asked by the advisor or Reader. An advisor cannot ask questions they themselves develop without their party;
- the hearing officer requiring rephrasing of any questions from parties that violate the rules of conduct;
- virtual rather than in-person hearings, to make the hearings less intimidating for parties and witnesses, and provide the hearing officer and coordinator more control over the proceeding. The University will consider individual needs for participation, such as for University-provided physical space for privacy or safety and for technological equipment or assistance; and
- careful consideration of other measures to protect the well-being of parties, such as ensuring use of lived names and pronouns.

Campuses should apply Appendix F to allegations of DOE-Covered Conduct that occurred on or after August 14, 2020. They should apply Appendix E to all other allegations against student respondents.

*Investigation and Adjudication Framework for Senate and Non-Senate Faculty (“Faculty Framework”) and Investigation and Adjudication Framework for Staff and Non-Faculty Academic Personnel (“Staff Framework”)*

As noted above, the regulations require live hearings and the right to appeal in investigated matters alleging DOE-Covered Conduct by employee respondents, including faculty, staff, and non-faculty academic personnel. The revised Faculty and Staff Frameworks provide that such cases will proceed under the DOE Grievance Process, which includes all of the elements and safeguards built into the student frameworks, PACAOS Appendices E and F, that are detailed above.

Under the Faculty and Staff frameworks, if both parties in a DOE Grievance Process accept the investigator’s preliminary determination, then the determination will become final and the University will impose any proposed sanctions and corrective actions; the parties have no further right to challenge the determination or resolution. If either party does not accept the preliminary determination, then the matter will proceed to a hearing. After the hearing, both parties will have the right to appeal on specified grounds. The hearing and appeal procedures are codified in an addendum to the frameworks, called the DOE Addendum. At the sanctioning stage, respondents have the same rights as in matters alleging non-DOE-Covered Conduct. This means that Senate faculty respondents have the right to an additional hearing with the Committee on Privilege & Tenure per the Academic Senate Bylaws, non-Senate non-represented faculty respondents have the right to grieve per the Academic Personnel Manual, and represented employees have the right to grieve per applicable collective bargaining agreements. Note that the Staff Framework applies to all represented employees, including staff and academic.

Investigations of non-DOE-Covered Conduct will proceed as they have in the past. However, for consistency and to facilitate compliance with the regulations, some additional rights related to notice, consideration of evidence, and evidence review are included in both processes.

Campuses should apply the DOE Grievance Process only to allegations of DOE-Covered Conduct that occurred on or after August 14, 2020. They should apply existing resolution processes to all other allegations against employee respondents.

### Next Steps

These policies are issued on an interim basis due to the limited time the Department afforded to comply. While we responded as thoughtfully and deliberately as possible in the time we had, we are nonetheless implementing some temporary solutions that we know are not tenable long-term. In particular, it is important

that the University address the possibility of two hearings in cases involving faculty and staff respondents, as this could make an already difficult process unacceptably long and arduous. As discussed above, the University must also more directly address the conflict between the evidentiary standard stated in the Academic Senate Bylaws and the SVSH Policy. The administration and the Academic Senate must work together to address these important issues as soon as practical.

Typically, we would ask that locations promptly update their local procedures to align with the revised policies, and submit them to our offices for review. Since all of the policies are interim, we do not make that request here. We also note that several states and advocacy organizations are challenging the legality of the regulations. We will continue to monitor this litigation, and support it as appropriate. While there is some uncertainty about the future of the regulations, implementation of the revised policies at this time is critical to our compliance with federal law.

We greatly appreciate the care and integrity that the professionals at your locations bring to this work every day. We know compliance with the new regulations will be a challenge. Together, we will meet it, keeping at the forefront the well-being of our community, our commitment to both fairness and compassion, and the University's culture of safety, respect and accountability.

Yours very truly,

A handwritten signature in cursive script that reads "Suzanne Taylor".

Suzanne Taylor  
Systemwide Title IX Director

A handwritten signature in cursive script that reads "Eric Heng".

Eric Heng  
Acting Director, Student Policies and Governance